Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:CIVIL TERM: PART 53

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OCTAGON CREDIT INVESTORS, LLC,

Plaintiff,

-and-

LBC III JC FUNDING, LLC, AND LBC III WF FUNDING, LLC,

Index No. 656677/2017

Plaintiffs-Intervenors,

-against-

NYDJ APPAREL, LLC, NYDJ CORPORATION, f/k/a APPAREL HOLDING I CORPORATION, APPAREL HOLDING II CORPORATION, NYDJ PRODUCTION, LLC, NYDJ RETAIL, LLC, WILMINGTON TRUST, NATIONAL ASSOCIATION, MUDRICK CAPITAL MANAGEMENT, L.P., MUDRICK DISTRESSED OPPORTUNITY GLOBAL, L.P., BLACKWELL PARTNERS, LLC-SERIES A, BOSTON PATRIOT BATTERYMARCH ST LLC,MUDRICK DISTRESSED OPPORTUNITY DRAWDOWN FUND, L.P., MERCER QIF FUND PLC, PBB INVESTMENTS III, LLC, ROSENTHAL & ROSENTHAL OF CALIFORNIA, INC.,

Defendants.

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60 Centre Street
New York, New York
January 9, 2018

B E F O R E:

CHARLES. E. RAMOS, J.S.C.

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Carolyn Barna
Senior Court Reporter

Proceedings

THE COURT: Good morning, everyone.

MR. LEVINSON: Good morning, your Honor.

MR. PARKER: Good morning, your Honor.

MR. LEWIS: Good morning, your Honor.

MR. HADDAD: Good morning, your Honor.

MS. PRIMOFF: Good morning, your Honor.

MR. McCALLUM: Good morning, your Honor.

MR. FUISZ: Good morning, your Honor.

MR. KAMINETZKY: God morning, your Honor.

MR. CRISP: Good morning, your Honor.

THE COURT: This seems to be the kind of case every time I blink my eye somebody files another motion.

For my benefit, please, tell me how you want me to address these four or five motions we have pending before us. What's the relief being sought and who is going to go first?

MR. LEVINSON: Good morning, your Honor.

THE COURT: Good morning.

MR. LEVINSON: Sidney Levinson, representing the Mudrick Defendants.

The primary motion before your Honor today is Defendants' motion to dismiss the lawsuit.

THE COURT: This is Defendant's -- this is Mudrick?

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MR. LEVINSON: This is all Defendants, yes.

THE COURT: All Defendants. Including NYDJ?

MR. LEVINSON: Including NYDJ.

THE COURT: Motion granted, everybody get out of here.

(Laughter)

THE COURT: A disposition is a disposition.

(Laughter)

THE COURT: Okay. There's the lectern, unless you want to say something?

MR. PARKER: I just wanted to say, your Honor, that I'm David Parker and I'd like to introduce Roger Lewis of the Law Firm Goldberg Kohn, Ltd. in Chicago. He has been admitted pro hac vice for this case and he's going to be arguing this motion for the LBC Plaintiffs.

THE COURT: I'm sure he will live to regret it. But welcome to New York.

MR. KAMINETZKY: Your Honor, Benjamin Kaminetzky of Davis Polk. I represent the NYDJ Defendants. So we have an initial -- just bringing you up-to-date so that we're clearing the underbrush, nothing I'm going to say now is controversial.

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We started out this lawsuit with a complaint and a motion for preliminary injunction filed by the Octagon Plaintiffs. You recall we were in front of you, you denied the preliminary injunction and the TRO, so it just became a complaint.

We then moved to dismiss that complaint, but before that happened, the other party, LBC, sought to intervene as another Plaintiff. We had now a problem with that now and they served their own complaint.

To save your Honor time and energy, we filed a joint motion to dismiss the two complaints, both the original complaint and the LBC complaint.

THE COURT: I think those are briefs I read.

MR. KAMINETZKY: We, all Defendants, filed one set of briefs. They then responded separately. We -- they post separately. We filed a joint reply last week, so it's really just a motion to dismiss.

Again, there is a motion to intervene which we've agreed to and so we're here to -- on a regular motion to dismiss the two complaints.

THE COURT: Thank you.

MR. PARKER: The motion to intervene has

been granted. The only pending motion, I think, that is left, is a motion to seal that LBC had made to be able to seal its opposition to the motion to dismiss.

THE COURT: Which mostly had to do with amounts and valuations and things of that nature.

MR. PARKER: Yes, your Honor.

There has been no opposition to that, so I think that is the only outstanding motion.

THE COURT: I haven't granted it yet. We don't grant motions to seal on default. We have to write an opinion.

This is your motion, sir. A simple motion to dismiss. They're so easy to grant.

MR. LEVINSON: Thank you, your Honor.

And it is a motion of all of the Defendants, to be clear. This was a joinder filed by a will and trust, but they joined with our brief.

For the sake of efficiency, your Honor, we've divided the argument as follows: I'm going to address the breach of contract claims on behalf of all of the Defendants and then Mr. Kaminetzky is going to address the implied duty of good faith and also the fraudulent transfer claim asserted by LBC.

THE COURT: As I understand it, this is a fight between different classes or classifications of

lenders, and the argument basically talks about -- from the benefit of my law assistant, the Plaintiff claims it is a lender that -- whose loan has been subordinated in terms of priority because the majority of a class of lenders, and I'm not sure what class we're talking about right now, it's a little confusing, there's some -- supposed classes that may not be classes under the agreement, so I'm not sure.

But the argument is that because a majority of the voting members of a particular class have claimed to have the power under these various loan agreements to modify the terms of the agreements and to modify, indeed, their own rights to recover, this is bad faith or commercial unfairness, or breach of contract or whatever.

MR. LEVINSON: That's the gist of it, your Honor. I mean, we'll talk about it as we go through the argument. The term loans at issue are part of a single class and we will talk about the definition of class and why that's the case.

But generally speaking, yes, your Honor certain lenders under this credit agreement are complaining about the second amendment and the effect it has to elevate the priority of the term loans of our clients and the other Defendants over their term

loans.

To give you a very brief overview of the transaction, it involved an incremental financing that was provided by our clients in the number of $20 million and that's pursuant to --

THE COURT: When you say "your clients", do you mean all of the lenders or just your clients?

MR. LEVINSON: All of the lenders who are Defendants. And are termed lenders. Maybe we should --

THE COURT: Let's start with the classification of lenders. I think that's very important.

MR. LEVINSON: So we have the term loans. Our clients are in the class of term loans. The arbor language, I think the name of the fund is PBB, if I'm recalling correctly, they are also a term lender who provided the $20 million in incremental financing.

The Plaintiffs are also members of the class of term loans. They obviously did not provide the financing. There is a separate --

THE COURT: They have not provided the additional financing that you folks agreed to.

MR. LEVINSON: Yes.

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THE COURT: Without telling them.

MR. LEVINSON: Right. They didn't provide that. One was offered the opportunity, one did not know about it, but I think that's undisputed.

There's a separate Defendant, Rosenthal --

THE COURT: I'm sorry?

MR. LEVINSON: Rosenthal is another Defendant. They are a revolving lender.

THE COURT: Okay. Not a term lender.

MR. LEVINSON: They are a revolving.

THE COURT: Do they have the right to vote on modification of lending terms?

MR. LEVINSON: They did. The majority of that class, through Rosenthal, consented to the transaction.

THE COURT: Is there -- let me ask the Plaintiff.

This is kind of a one shot question. I think you're asserting that at least one aspect of this refinancing, if that's what it is, or restructuring of loans, at least one facet, from your perspective, required consent of each individual term lender; is that true?

MS. PRIMOFF: Yes, your Honor. I have got a demonstrative, a one-page demonstrative I think

will cut through a lot of this and hopefully help.

THE COURT: I love cartoons. Sure.

MS. PRIMOFF: (Handing.)

THE COURT: If I read it upside down, will it help?

MS. PRIMOFF: No. But maybe the colors will help.

So the original agreement you see on the left side in blue, term loans of 144 million as of May.

THE COURT: That encompasses Plaintiffs and Defendants?

MS. PRIMOFF: Correct.

The revolver of 2 and-a-half million, so the total 12 and-a-half, and 156.5 million, this was as of May 2017 when the amendment was effected. And the right side with the colors shows the effect of the amendments, so they layered on 20 million of incremental at the top.

In the middle, the yellow, has term loans of 76.3 and a revolver of 12.5 for the total of 88.8 and then the bottom back of the line is the excluded term lenders.

THE COURT: If we looked at it in terms of waterfall, was the original agreement the waterfall

that everyone was a participant and --

MS. PRIMOFF: Yes.

THE COURT: And this is a new waterfall now, the three stages?

MS. PRIMOFF: That's correct.

THE COURT: Okay. Thank you.

MR. LEVINSON: Your Honor, the breach of contract question for this Court to resolve is pretty straightforward, which is did Defendants have the right under the credit agreement to amend it in the matter that's provided under the second amendment and if so, there's no breach.

Now, there is a motion to dismiss so we have to accept the facts to be alleged as true, but whether a contract is unambiguous is, of course, a question of law and extrinsic evidence is not admissible for that purpose.

So, despite the best efforts of Plaintiffs to focus their opposition on the facts that are alleged, today's motion turns on language of the credit agreement which nobody is suggesting wasn't negotiated and entered into by sophisticated parties.

Indeed, as your Honor held in the Prudential v. West LB case, a case cited by

Plaintiffs and a case that both your Honor and counsel for Octagon are familiar, the best evidence of parties to a written agreement's intent is what they say in writing.

So let's turn to Section 9.02(b) which governs the amendment. And there are many versions of it. I'm looking at the version that's Exhibit 3 --

THE COURT: Why would there be many versions of it?

MR. LEVINSON: I'm sorry. Many versions filed with the Court. Each party filed a version -- well, not a version --

THE COURT: Well, these versions don't differ, do they?

MR. LEVINSON: They do not.

THE COURT: Okay.

MR. KAMINETZKY: Multiple copies.

THE COURT: Which exhibit?

MR. LEVINSON: I'm looking at the affirmation of Mr. Kaminetzky that's attached to our motion to dismiss a Exhibit C.

THE COURT: C?

MR. LEVINSON: It is.

THE COURT: It's the telephone book sized

exhibit(indicating)?

MR. LEVINSON: It is.

THE COURT: This is a demonstrative exhibit as to why judges require, at least in the Commercial Division, require hard copies. You cannot examine a document like this on the Internet; you'll go crazy or blind or both.

MR. LEVINSON: I agree with you, your Honor.

It is page --

THE COURT: I appreciate you supply working copies.

MR. LEVINSON: It is page 160, Section 9.02.

THE COURT: I love concise agreements; only 160 pages.

MR. LEVINSON: Everybody seems to agree the general rule under 9.02(b) is that amendment only needs consent of the, quote, "required lenders." That's a general rule. That's a defined term. That means a majority of all of the lenders.

But there's a list of exceptions to that rule. And they are in Section 9.02(b) and there are ten specific exceptions to be precise.

Now, if an amendment doesn't fall within

one of those exceptions, required lender approval is sufficient. But, in each of the circumstances of the ten exceptions, some additional level of consent is required. That additional level of consent varies in degree.

In four of the provisions, Roman Numeral, that's one, six, seven and eight, the amendment requires the consent of each lender full stop. In three of the provisions, the amendment requires the consent of each lender directly and adversely affected thereby. That totals seven provisions requiring individual lender consent.

THE COURT: I take it the Plaintiff contends or Plaintiffs contend they fall within the parameters of at least one of those subsections?

MS. PRIMOFF: Four of them.

THE COURT: Only four? Okay.

MR. LEVINSON: Well, that's not correct, your Honor. There are two that they cite that require individual lender consent, but there are two that they cite that do not. Those are the other three provisions.

I said there were ten. Seven of them require individual lender consent. In the remaining three, which are four, nine and ten, individual

lender consent is not required.

THE COURT: I think they agree with that, they are not all -- required unanimous consent. But they're saying that they fall within one or more categories that require their client's consent. That's what I have to focus on.

MR. LEVINSON: What they allege, yes, two of them do, and we will get to those certainly.

But the two key ones, the ones that get focus of the attention, which are four and nine, don't require individual lender consent; rather they, they only require the consent of a class of lender.

THE COURT: Plaintiff, which of these ten categories do you contend your clients fall into? Give me the numbers.

MS. PRIMOFF: We fall into where we have a block, you're saying?

THE COURT: Yes.

MS. PRIMOFF: Two and eight. So reduction of principal and release of collateral.

THE COURT: Sorry?

MS. PRIMOFF: Two and eight.

THE COURT: Two and eight, all right. Those are the only two that you feel cover your client and protect your client from being essentially

diminished in this waterfall?

MS. PRIMOFF: No, no, no. Not at all, your Honor.

So, with respect to four and nine, where they subordinated excluded lenders to included lenders, we say that there is no intra class subordination of term loan lenders allowed under this agreement.

THE COURT: So you say under four and nine it's prohibited?

MS. PRIMOFF: Yes.

THE COURT: How should I be looking at numbers two and eight?

MS. PRIMOFF: Those are additional arguments, so.

THE COURT: Where do you want me to focus my attention? Which of these subsections do you really want me to focus on?

MS. PRIMOFF: Well, I'm prepared to go through all of them. We start with four and nine.

THE COURT: I will start with four and nine. I'm not precluding anything, but I do want to focus what you think your best argument is.

MS. PRIMOFF: Okay.

MR. LEVINSON: Four and nine don't require

consent of individual lenders; we all agree on that. It requires the consent of a Class of lenders and Class is a capitalized defined term.

THE COURT: Hang on.

So both four and nine if you have a majority in interest on outstanding loans, they can make the modification.

MR. LEVINSON: Right. Of the Class, capital C. And we will get to what it means.

THE COURT: Plaintiff, do you agree with counsel's characterization of four and nine?

MS. PRIMOFF: No. It has to be each adversely affected class, your Honor. And --

THE COURT: Hang on. So you're focusing on the term each adversely affected class?

MS. PRIMOFF: I'm focusing on that term and --

THE COURT: That means I have to look at this vote that takes place and determine whether or not the voting lenders fall into a class of adversely affected lenders?

MS. PRIMOFF: Right.

Also --

THE COURT: Is there a definition of adversely affected class? There is only a definition

of class, as I understand it; correct?

MS. PRIMOFF: Right.

MR. LEVINSON: That's correct, your Honor.

THE COURT: There's no definition of adversely affected class?

MR. LEVINSON: Adversely affected are not defined terms. Class, which is a defined term, which is dispositive --

THE COURT: Does that mean -- I take it from the Movant's point of view that that means that to be an adversely affected class, it has to be a defined class in the first place?

MR. LEVINSON: Has to be a defined class in the first place.

THE COURT: Do you agree?

MS. PRIMOFF: Well, we have alternatively included lenders and excluded lenders effectively put into a separate class, we advance that argument as an alternative argument, but our principal argument is that the term loan lenders as it relates to a subordination of excluded term lenders to included, there is no adversely affected class. They are all in the same class.

MR. LEVINSON: If I may address that point, your Honor?

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THE COURT: Hang on. That thought is bouncing on what's left on my brain. Oh, my God.

MS. PRIMOFF: Your Honor, if I could focus, in fact, on the words of Romanette four, it says: Change to 18(b) or (c), so change the pro rata, in a manner, and those words "in a manner" are also very important, that alters the pro rata sharing without consent of lenders holding a majority of each adversely affected class.

And to the extent that they want to subordinate term, whether it's to the incremental or to the revolver, that's fine, but they have to subordinate all of the term. They can't say we're going to pick and choose among terms and say we're going to let the included lenders not be subordinated and we're just going to subordinate the excluded lenders because each --

THE COURT: I take it the included lenders produced additional capital for the amendment?

MR. LEVINSON: That's correct, your Honor.

By the way, those are not terms used anywhere in the amendment. Those are counsel's terms.

But it's worth stepping back to recall what this list is. This list of ten exceptions, now we're

focused on clause four, are exceptions to the general rule that required lender consent is sufficient. So if it is counsel suggesting this provision somehow didn't apply, then it would be required lenders that need to consent.

Now, we have a different view. And I say that because clause four specifically governs change the pro rata distributions. The parties thought about this as to whether or not it should be a sacred right. And what they included was okay, we're going to give it protection, but only with respect to a class vote, not individual lender consent vote.

THE COURT: You know what really bothers me about this whole transaction, I can understand lenders going into a deal like this with a provision like this as a way of providing some leverage, that is if you don't participate, if you're not an included lender, you're going to be penalized.

So, to that extent, it seems to be a commercially reasonable and not an overreaching or bad faith effort. But, it seems, from what the Plaintiff is telling me anyway, it seems that this was not used as a way of convincing other term lenders to participate in this refinancing. Rather, it was a way of cutting some of them out without

letting them know what's going on.

In other words, there can be a legitimate and an illegitimate purpose to this kind of purpose. The legitimate purpose would be to give to motivate all of the term lenders to participate in its refinancing so you can save the company and everybody gets a little bit of benefit from it, the lenders get a little bit more of the hope that they're going to be repaid at some point if this company can survive.

Apparently that was not what was done. And it looks like the reasonable commercial expectations of the lenders participating in this arrangement is being undermined by some of the lenders getting together and saying look, if we don't tell the other guys what we're doing, we can cut them out of the picture. It doesn't seem very fair.

I don't think, I don't think there is really -- this satisfies the commercial reasonableness filters through which we look at all of these kinds of contracts. It sounds like an abusive use of these terms.

MR. LEVINSON: We would disagree, your Honor, for a variety of reasons. Again, we have to, for purposes of this motion, take the facts as alleged and we haven't attempted to dispute the facts

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at this particular stage.

But, again, what we have here is an ability of a company, you know, a company is given a certain, we will call it tool box, of tools to try to restructure itself and --

THE COURT: It's a retailer?

MR. LEVINSON: It's a retailer, yes.

THE COURT: No wonder it's going on.

MR. LEVINSON: They sell jeans.

THE COURT: Thank you, Amazon.

MR. LEVINSON: There are certain limitations imposed in Section 9.02 (b)and they were specifically negotiated by the parties. They went through and created various exceptions to what can and can't be -- what level of consent is required for certain amendments, but as to pro rata sharing, --

THE COURT: For example, I'm trying to look at this as if it was any sort of a vote being taken whether its lenders or shareholders or cooperators or whatever. How can you look at the paragraph 4, change section 2.18 (b) or (c) in a matter that would alter the pro rata sharing of payments required to buy without the written consent of lenders.

Doesn't the phrase written consent imply that you're going to ask everyone to consent?

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MR. LEVINSON: I don't think it does, your Honor. I think it -- written consent requires an agreement among, in this case -- I mean, if they needed written consent of every lender --

THE COURT: No, no. I'm not saying they required the written consent of every lender. But how do you determine if you have the consent of lender A, if you don't ask lender A would you consent. Instead, you have a quote majority, a slight majority, going off into a side room and saying we're going to consent amongst ourselves and the hell with the rest of these guys.

It really seems unethical --

MR. KAMINETZKY: Your Honor. May I --

THE COURT: -- as if there is such a concept of business ethics and it's not an oxymoron. And I think there is, quite frankly, I think judges adhere to it.

MR. KAMINETZKY: Mr. Levinson is arguing the contract. Your Honor, there is no provision -- this number four when you read the same words over and over you can find ambiguity. It said you needed majority of affected class. The class are the term lenders. And we --

THE COURT: But it doesn't say that. It

says the written consent. To me, that implies that you ask them, you inform them this is what we're going to do.

MR. KAMINETZKY: There's certainly provisions out there that require, you know, solicitation rules and everything else you ask every shareholder, every bondholder something.

This was an agreement negotiated between Goldman Sachs and my client, NYDJ. Davis Polk, Milbank Tweed, Morrison & Forrester were the lawyers on this agreement. So we're not talking about babies --

THE COURT: Guess what? I'm not impressed.

MR. KAMINETZKY: I don't mean to impress you, but I'm saying --

THE COURT: The former president of Goldman Sachs Emeritus is a friend of mine. He's appalled at the way Goldman Sachs has been behaving lately.

MR. KAMINETZKY: Goldman Sachs is on the other side of my client. I represent the poor jeans company trying to survive.

THE COURT: Look, you're asking for a dismissal of the case at this point. And I'm offended by the idea that you can obtain consent, the

required consent, by only notifying some of the lenders.

MR. KAMINETZKY: It says that you need a majority of the lenders. There is no requirement in here to solicit everybody, take a vote, and then count votes and see if you have a majority.

There are certain rules in securities laws and everything else that require people to go out to the class or to the market and solicit everyone. That's just not here.

Of course your Honor could read it in, but every single case that talks about the implied covenant of good faith and fair dealing says that is -- if there is plain language addressing the situation, especially when you're dealing with parties --

THE COURT: I would agree that if the plain language excluded that requirement, but you are asking us to turn a blind eye. And, at this point, this is a motion for dismissal. This is not summary judgment.

We've conducted no discovery at all. I have no idea what went on between the parties when this agreement was being negotiated. Quite frankly, nor do the Plaintiffs's attorneys.

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MR. LEVINSON: Your Honor, under principles of contract interpretation, parties aren't required to take actions that are, you know, so unnecessary or --

THE COURT: Isn't there an implied covenant of good faith anymore?

MR. LEVINSON: The question here is would --

THE COURT: These lenders put together a package of over $150 million to try to bail out a failing company. They all took risks. They know that. They are sophisticated parties. This is not -- there's no win win here.

And I'm really disturbed at what the Plaintiffs are alleging happened. And I don't know what happened because I wasn't there. But what they're alleging is that a group of lenders, without notifying another group of lenders, on their own said look, we can do something for ourselves at the expense of our co-lenders.

MR. LEVINSON: That's simply not true as to Octagon and --

THE COURT: That's true. They were informed and they said we don't want to be a part of this because it's so unethical.

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MR. LEVINSON: That's what they claim, but --

THE COURT: That's what I see now. This is a motion to dismiss. We haven't had discovery yet.

MR. LEVINSON: Your Honor, again, coming back to the plain language of the agreement and what is expressed because the intent of the parties is to be determined by what is written in the agreement. Here --

THE COURT: And if the intent of the parties as expressed in the agreement clearly excluded what I'm talking about, as is the application of a good faith standard, okay, you would have your dismissal.

But I do, and we do, in the Commercial Division, look through a filter of commercial reasonableness and good faith dealing.

This sounds like a conspiracy. I know that's not a separate tort, but it offends me. Doesn't mean you're going to lose. But it means you might not get this motion granted.

MR. LEVINSON: And I would submit that this motion should be granted because, again, we're talking about sophisticated parties. We're talking

about a provision -- this isn't a situation where there was no reference to changing the pro rata provision anywhere in the agreement where --

THE COURT: I think Plaintiffs acknowledge that, too. Again, I see this in terms of how do I interpret this agreement as being commercially reasonable. And it's, to me, an incentive, I think I said it before, incentive for all of the lenders to get together and pony up some additional money.

That is what it sounds like to me. That would be the common sense approach to it. Sorry about the oxymoron.

But it wasn't interpreted that way by the Defendants. They saw it as an opportunity apparently to do something without notice to all of the other lenders. Very much to their detriment.

MR. LEVINSON: What it provided was an opportunity for the company to get $20 million of incremental financing and being able to offer something in return to our clients that would induce them to provide that $20 million which serves a --

THE COURT: It may be that what was done here was the only commercially reasonable thing that could have been done. I'm still offended by why this -- it was done without notifying all of the

other lenders.

MR. KAMINETZKY: Your Honor, you're missing part of the story. Again, we represent the borrower --

THE COURT: You're the retailer.

MR. KAMINETZKY: The jean company, Not Your Daughter's Jeans.

The allegations in the complaint are this: We needed covenant. There's a credit agreement here. We were in danger of breaching covenant. So we did go to the lenders group, this is in the complaint, and say can we have covenant relief and they said no.

It's only then that we said uh-oh, okay, now, we didn't get the covenant relief, we're going to be in default. And so we said let's look at the credit agreement and see what we could do to get --

THE COURT: What you're telling me is something I'll certainly be interested in hearing about, but --

MR. KAMINETZKY: The --

THE COURT: Excuse me. Excuse me.

MR. KAMINETZKY: I'm so sorry.

THE COURT: And I'm not trying to be curt about this, but it's a motion to dismiss. This is a

motion based on pleadings, based on the contract. And what you're giving me is outside of the contract. It's factual. And I'm not saying it's not true, but it's not what I would be considering on a motion under 3211.

MR. KAMINETZKY: My only point, your Honor, is that this is in the complaint. What I just told you is alleged in the complaint. That we did go out to lenders for covenant relief. This is in the complaint at paragraphs 35 and --

THE COURT: Let me ask you the next logical question that I would want to see happen if it were all lenders. Did you inform all of the lenders that if they would not agree to the refinancing as a group, that you would then approach some of the lenders to see if you could put together a package that would be majority?

MR. KAMINETZKY: Not to my knowledge. I don't know the answer to that.

THE COURT: That's what I find offensive. I can't come up with a good reason why you didn't do it, except that you were trying to get over on somebody.

MR. KAMINETZKY: I'm --

THE COURT: Because it may be, that your

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clients -- I'm sorry. That the some of the Defendants would not have prospered as much if that was case. Why did they do it that way? Yeah, maybe you had the right to do it because it wasn't excluded, but the right wasn't granted either.

Again, we look at these contracts through a filter of commercial reasonableness and good faith.

MR. LEVINSON: The contract confers certain rights on all of the parties. All lenders, all sophisticated. Putting value judgments on, you know, when a lender gets benefits to which it might be entitled, I think goes beyond, you know, well, you have expressed provisions, a reading of the agreement --

THE COURT: My problem is there's a limit to these things we would turn a blind eye to.

MR. LEVINSON: Understood, your Honor. But in all of the cases that Plaintiff cited on the issue of commercial reasonableness in their papers, interestingly, all of them involve situations where there wasn't express language. It wasn't a situation where the court found well, this is commercially unreasonable in the face of the express language.

Here, we have a very specific provision. That's what makes this agreement unique. A very

specific provision, clause four, that says you can change the pro rata. I mean -- by the way, the provision doesn't only talk about pro rata among the classes like Plaintiffs say. It's any pro rata under 218 (b) or (c). That covers all lenders. And it says you can do it so long as you have the consent of a majority of an adversely affected class.

They knew how to write a provision differently if they had wanted to. We see that throughout Section 902(b). If they wanted to make it just apply to a class by class basis, they could have written it like they did clause nine which only applies to what counsel refers to as inter class. But they didn't. It applies to intra class specifically on its face.

By the way, they also could have written the --

THE COURT: Is there any provision, I haven't read the entire document, it's over 200 pages long.

MR. LEVINSON: By the way, they could have written it like they did clause two. That is one of the provisions they cite --

THE COURT: Hang on. I don't want to lose my thought.

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MR. LEVINSON: It's what it says.

THE COURT: Is there any provision in the agreement that expresses in one way or the other, what rights or obligations the various lenders have to one another, or is it silent?

MR. LEVINSON: The agreement does have provisions with respect to -- that talk about duties of the borrower and the loan parties. I'm not aware of a specific provision that addresses, you know, on a lender by lender basis.

THE COURT: Usually these agreements are silent on that subject.

MR. LEVINSON: I believe this one is.

THE COURT: I was just wondering because in some cases you might have a disclaimer where the parties agree that the lenders have acknowledged they have no rights or obligations with regard to one another.

MR. LEVINSON: Again, your Honor, if the intent -- if this agreement didn't include clause four, if it had just been silent on pro rata, none of us would be in this courtroom today. This transaction wouldn't have happened.

And the reason it wouldn't have happened is because we wouldn't be able to point to something in

the agreement that says this is an issue that was thought about and that the parties wrote the following words that mean the following thing.

THE COURT: But the purpose of it, I'm assuming, had to be used as a way of cajoling all of the lenders to at least consider participating in the extended financing. The revised waterfall. There would have been a give and take.

This is additional risk you're taking, but this is the reward, we may be able to save the company. You might have to wait a little longer for your money, you might get a few less -- a smaller percentage of return on your investment, but we're in a bad situation, we've got to do the best, given the circumstances. That's fine.

But that's not what happened. I can't ignore what happened here. I can't ignore the fact that you folks did this without letting the other lenders know.

And the only lender that did know, Octagon, said this is unethical and I'm not going to be part of it. And I commend them for that.

MR. LEVINSON: They allege they said that.

THE COURT: I'm looking at the pleadings. They could be the devil incarnate, but I

don't know. This is just a motion to dismiss.

MR. LEVINSON: Again, the fact that clause four is so specific and there's nothing in clause four that suggests purpose that your Honor is ascribing to it.

Clause nine covers --

THE COURT: But every provision in a contract like this, particularly like this, has a purpose. And I am racking my brain as to what the purpose is. I can't imagine the purpose is this is a way of cheating our co-lenders.

The purpose seems to me pretty apparent that it's a way of cajoling all of the lenders to participate in refinancing. In other words, come along with the majority; otherwise, you're going to suffer the consequences of not coming along, which is commercially reasonable. I mean, this is a bad situation. This company is not doing well.

Plaintiff, tell me why I shouldn't grant this motion. Somebody.

MS. PRIMOFF: Plaintiff tell us why you should not grant the motion? Your Honor --

THE COURT: I'm sorry.

Is everybody here(indicating) for the Plaintiff?

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MR. LEWIS: Yes.

MS. PRIMOFF: So we represent Octagon.

THE COURT: Why are you here from Chicago, other than the fact you want to come here and eat at our restaurants?

MR. LEWIS: LBC has its own claims in this case, your Honor.

THE COURT: Okay.

MR. LEWIS: Breach of contract -- the claims are somewhat different. LBC was not given any notice. Octagon was given notice and they said no. We weren't given --

THE COURT: Octagon first.

MS. PRIMOFF: So your Honor asked the question what was the purpose of Roman four. We have an answer. The purpose of Romanette four is if you allow the class of term loans to subordinate to another class, if the class decides to do that, there is nothing in Romanette four that allows a majority of term loans to say great, we're going to subordinate you, the minority. The words don't allow for that.

And they don't have a response to that because there is no adversely affected class in that context.

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THE COURT: So what you're saying is they couldn't carve a class out of the term loans except by creating it themselves, but if they -- how extensive is their power to amend?

MS. PRIMOFF: The power to amend covers inter class subordination. So they could subordinate all of the term to all of the revolvers. And the reason you have the class vote is so the majority of the class can bind the holdouts that don't go along with class vote.

The purpose of the provision isn't to allow the majority to say ha ha to the minority. It's simply to buy the holdouts that don't want to go along so that everybody gets bound together. And that's our interpretation of the agreement, your Honor.

So, on points four and nine, we think the agreement is very straightforward in our favor. It's a cogent commercially reasonable interpretation. It is not one that imposes a penalty on everybody sitting on this side of the table and gives a windfall to everybody sitting on that side of the table.

I'm happy to address the other two provisions that we have a problem with if you would

like me to or I'm happy to sit down, whatever your Honor wants.

THE COURT: Any thoughts?

MR. LEWIS: Your Honor, I think that the fact Davis Polk, which was deal counsel in the litigation, didn't stand behind the amendment either. They issued an opinion that did not give them -- opinion that this was a valid exercise either.

Goldman Sachs, you know, sophisticated, they ran away sometime before the thing got done. They didn't think it was valid. That's all in the complaint.

There are other indicia of fraud here. Constructive fraud or breach of contract or breach of implied duty of good faith. They're all in the complaint. They're all well alleged. And I don't think there's anything other than to deny the motion at this stage.

MR. LEVINSON: Again, your Honor, we come back to the plain language of the agreement. And the fact that the parties included a provision with respect to pro rata. The explanation that has been provided is just not consistent with the express language.

If they had wanted to write four like that, they had plenty of models within Section 902(b)to do it. And the parties didn't do it. And to simply disregard what the parties agreed to that provides the company with the flexibility to offer something to certain lenders and, you know, and not others as a way to, in this case, to induce additional financing, is something that was negotiated.

I mean, all of their arguments require this Court to read the provisions and language into these provisions that simply don't exist. As read, it allows for it.

And the other provisions that they have cited, and we can talk about some of the other arguments that they make as to clause two or eight as to why those are not applicable and probably worth spending a moment, we certainly can address the fraudulent transfer claim as well, but Mr. Kaminetzky will do that.

Again, it comes down to the language and the definition of class. Class is a defined term under this agreement. And I recite the Music Land case. I think Music Land is a really important case in this context because Music Land --

THE COURT: Did the authority granted under

section four grant to the majority the right to create additional classes or classifications of lenders?

MR. LEVINSON: This isn't creating additional class. This is changing --

THE COURT: I take it it did not.

MR. LEVINSON: It did not and it did not contemplate it because it's one class.

There's a single class of term loans that the right to consent, the majority of that class. There's no creation of a new class of creditors. It doesn't fall within the definition of class.

THE COURT: But if you look at the excluded and included loans, aren't we, in fact, creating two new classes of loans?

MR. LEVINSON: We are not, under the definition of class.

And this is why the Music Land case is really important, your Honor. The --

MR. KAMINETZKY: Can I just answer your Honor's --

THE COURT: Where is the definition of class?

MR. KAMINETZKY: Your Honor, you would maybe be right - well, your Honor's always right, no

matter what - if class wasn't a defined term.

THE COURT: Where's the definition?

MR. KAMINETZKY: Page 8, your Honor.

And if this was a lower case C instead of capital C, I would understand your Honor's inclination to say that well, now they divided it into two classes. But it's a capital C.

MR. LEVINSON: And this is why Music Land --

THE COURT: Hold on.

MR. LEVINSON: I'm sorry, your Honor. My apologies.

THE COURT: The definition raises a thought in my mind that what Defendants have done here is in violation of the agreement, they've created two new classes, included and excluded.

MS. PRIMOFF: That's correct, your Honor.

And we spent four pages of our brief on this very subject and we go through a lengthy analysis of the agreement as a whole, not just the definition of class.

And we analyze what's the hallmark of the class. Because the definition of class talks about loans having different terms and conditions as being the hallmark of a class.

And this agreement contemplated future classes and it had replacement loans, it had extension loans. It contemplated that there would be future classes.

So they did the amendment, they should have updated the definition of class to include included loans and excluded loans. They conveniently and intentionally chose not to do that. But we've got the duck test cited in our papers. If it walks like a duck and it quacks like a duck, it's a duck. Not a chicken.

MR. LEVINSON: Your Honor, this is -- a class is a defined term. And they did, in fact, as counsel correctly points out --

THE COURT: And are you saying that your clients were incapable of breaching the contract and creating new classes?

MR. LEVINSON: Of course not.

THE COURT: It's a free country. We can do whatever we want to do. It may not be legal, but if they want to.

First I want to make sure I've covered all of the various elements of the motions to dismiss here.

MR. KAMINETZKY: Your Honor, there's a

separate fraudulent conveyance claim which I think will take me two seconds to --

THE COURT: No. I'll do it. I will write on all of this.

But I am denying the motion. The action is continuing. The motion is denied.

Get your answers in and get going on discovery.

With regard to the fraudulent conveyance, you can hold off on responding to that element of the complaint until I have decided on the papers here.

I've got to take care of other motions here. But you're going to start with discovery, get your document demands out if you haven't gotten them out already, and as soon as you get answers from the Defendants, go see Ms. O'Neill and set up a date for a preliminary conference.

MS. PRIMOFF: Thank you, your Honor.

MR. PARKER: Thank you, your Honor.

MR. LEWIS: Thank you, your Honor.

MR. KAMINETZKY: Thank you.

Your Honor, could I have 30 more seconds?

THE COURT: Goodbye. Nice to see you all.

MR. KAMINETZKY: Your Honor, the fraudulent conveyance, it's out of left field. There was no

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conveyance by my client period. So the reason --

THE COURT: I understand what you're saying, but give me a chance to write on that. I want to write on both. I think it's important to have a written opinion.

You will proceed on the main claim. The fraudulent conveyance you don't have to respond to yet, that portion of the motion will be held in abeyance. I'll decide it on papers.

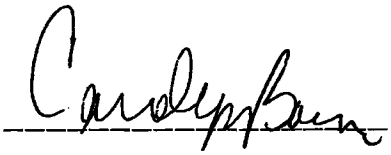
MR. KAMINETZKY: Thank you very much.

MS. PRIMOFF: Thank you, your Honor.

(Record is closed.)

** ** **

This is certified to be a true and accurate transcription of my stenographic notes.



CAROLYN BARNA

SENIOR COURT REPORTER

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